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92-1919
NO.

Supreme Court, U.S.
FILED
JUN 01 1993
OFFICE OF THE CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1992

JERRY D. HOLLEY,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

ON PETITIION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS,
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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45 pp

QUESTIONS PRESENTED

1. Whether the statutory command of dismissal for violaation of the Speedy Trial Act is mandatory or subject to an actual prejudice analysis.

2. Whether a trial court, 43 days after expiration of the time required for violation of the Speedy Trial Act, can *after the fact*, justify its violation of said Act by *then entering* an order extending the time for trial upon an entirely different ground than that stated in its only prior order, and erroneously designating its *actually after the fact* order and alleged reasons therefor, as a nunc pro tunc order.

3. Whether a mere congested calendar constitutes "navailability of witnesses or other facts resulting from passage of time" within the meaning of 18 U. S. C. 3161(e).

4. Whether, after jeopardy attaches, a judge may dismiss the jury and immediately thereafter pick a new jury and try the Defendant solely because his *secretary* tells him that one of the juror's doctors *just told her* that he *doesn't think* the juror *should* continue, *without considering any other alternative* and when all of said evidence occurred outside the presence of the Defendant, and defense counsel's only statement, other than declining to try the case with eleven jurors, was that defense counsel wanted to go forward and that the Court should at least wait for some period of time to see if the juror might become alright.

5. Whether an essential element in the perjury *statute*, to wit: "*materiality*" *to the actual issues before the*

QUESTIONS PRESENTED (continued)

court, can be changed and altered by Rules of Civil Procedure to include mere questions of discovery that *might lead to* the finding of matters material to the issues in the case.

6. Whether the holding of the Supreme Court in *Bronston vs. U. S.,* 93 S.Ct. 595, that a response to a question, though deliberately misleading, cannot constitute perjury unless it is literally false, requires a trial court, upon proper objection or request, to charge the jury on said critical law when an issue exists in the evidence as to whether the alleged perjury was literally true but misleading.

7. Whether Rule 404(b) of the Fed. Rules of Evidence was so flagrantly violated as to deny Petitioner the fundamental fairness essential to Due Process of Law under the Fifth Amendment to the Constitution of the United States.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

JERRY D. HOLLEY,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

ON PETITIION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS,
FOR THE FIFTH CIRCUIT

The Petitioner, Jerry D. Holley, prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals, Fifth Circuit, rendered in these proceedings on March 9, 1993.

OPINIONS BELOW

The opinion of the United States Court of Appeals, Fifth Circuit, *U. S. v. Jerry D. Holley,* yet unreported, appears at Appendix A.

JURISDICTION

The opinion and judgment of the United States Court of Appeals, Fifth Circuit, (Appendix B) was rendered on March 9, 1993. Jurisdiction to review said judgment herein by writ of certiorari is conferred on this Court by 23 U.S.C.A. 1254(1).

CONSTITUTION PROVISIONS, STATUTES AND RULES INVOLVED

United States Constitution, Amendment V:

> "No person shall .... nor be deprived of life, liberty or property, without due process of law"

18 U. S. C. § 3161(e):

> "... If the defendant is to be tried again following an appeal or a collateral attack, the trial shall commence within seventy days from the date the action occasioning the retrial becomes final, except that the court retrying the case may extend the period for retrial not to exceed one hundred and eighty days from the date the action occasioning the retrial becomes final *if unavailability of witnesses or other factors resulting from passage of time shall make trial within seventy*

days impractical. . ."

18 U. S. C. § 3161(8)(A):

"(8)(A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial."

18 U. S. C. § 1621:

"Whoever —

(1) having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any *material* matter which he does not believe to be true; or . . ."

STATEMENT OF FACTS

Appellant was indicted and tried in the Western District of Texas and convicted on a not guilty plea by a jury of two counts of perjury and was sentenced by the court to 16 months confinement as to each of Counts One and Two, with said terms of imprisonment to run concurrently. Duly filed motions for judgment of acquittal to arrest judgment and for new trial were overruled. Hence this appeal.

At all times material hereto Appellant served as Chairman of the Board of Directors of Peoples Savings and Loan, which later failed. Both counts in said indictment alleged perjury to have been committed by Appellant when his deposition was taken *in connection with* a proceeding in bankruptcy court to determine Appellant's dischargeability as to certain specifically alleged claims against him by Peoples Savings and Loan Association in its First Amended Complaint to bar discharge of said claims. (Govt. Exh. 15) Said amended complaint alleged certain specific acts resulted in losses to Peoples and were fraudulent, and prayed for the damages set out therin and an adjudication of non-dischargeability. (Govt. Exh. 15)

Count One alleged that Appellant made four different separate false statements in said deposition, and Count Two alleged that Appellant made eight different false statements. (R. I, P. 16) *All* of said alleged false statements pertained to Appellant's knowledge of who signed a $25,000 letter of credit almost four years prior that was issued on a form designating Peoples Savings and

Loan as the issuer and had on the bottom thereof a signature, "Mary Kam, secretary." (R. VIII, P. 122-124) (Govt. Exh. 5) Petitioner's secretary admitted she signed her mother's name "Mary Kam" to the LC and claimed petitioner directed her to do so. He denied having done so. *It was undisputed that Peoples sustained no loss as a result of said $25,000 letter of credit, so no claim was ever asserted in the bankruptcy proceedings pertaining to said $25,000 letter of credit by Peoples Savings and Loan or by any other person or entity.* (R. IX, P. 212) Thus, the $25,000 letter of credit simply *was not* and *could not* be a legitimate issue in said bankruptcy proceeding as to dischargeability of the alleged debts to Peoples.

REASONS FOR GRANTING THE WRIT

I.

The United States Court of Appeals in failing to dismiss the indictment herein for violation of the Federal Speedy Trial Act has erroneously decided herein an important question of Federal statutory law, which has not been, but should be, settled by this Court.

The Court below holds with regard to violation of appellant's rights under the Speedy Trial Act, the following:

> "We believe that Holley was not prejudiced by the delay, and therefore his rights under the Speedy Trial Act were not violated."

The statutory remedy of *dismissal* for violation of the Speedy Trial Act *is mandatory* and *not subject to a harm analysis. U. S. v. Kington,* 715 F.Supp. 781 (N.D. Tex.), *U.S. v. Connor,* 926 F.2d 81, *U. S. v. Adu,* 770 F.2d 1511.

The trial court on October 24, 1991, then, for the first and only time between remand and trial, entered an order setting the date for trial of Appellant for January 21, 1992, a date *forty-three (43) days beyond the expiration of the seventy (70) day deadline for trial after remand.* (R. 1, P. 219) Said order stated therein that the time between the mandate on September 13, 1991, and the new trial date January 21, 1992, was excluded under the terms of the Speedy Trial Act, 18 U. S. C. § 3161 *(h) (8).* (ends of justice continuance) Since no continuance had been sought nor granted such could not possibly exclude time. Furthermore, § 3161*(h)(8)* absolutely requires a setting forth in the record the reasons why granting such outweighs speedy trial interests. Thus, when Petitioner's motion to dismiss was filed 43 days after the Speedy Trial Act had been violated, the Government and Court knew the prior order was ineffective.

The opinion below holds that the trial court, forty-three (43) days after the time required for trial under the Speedy Trial Act had expired, could, *after the fact,* and in response to a duly filed motion to dismiss therefor, justify its violation of the Speedy Trial Act by *then entering* an order extending the time for trial upon *an entirely different ground than that theretofore stated in its only prior order,* when the court arbitrarily set the case for trial date forty-three (43) days beyond that required by the Speedy Trial

Act.

The cases of *U. S. v. Frey,* 735 F.2d 350(9), and *U. S. v. Carrasquilo,* 667 F.2d 382(3), hold that any *after the fact justification* for an unauthorized delay of trial in violation of the Speedy Trial Act *is ineffective* to justify same. The very few cases that uphold nunc pro tunc orders as to the Speedy Trial Act are those orders setting out the reasons for the granting of an ends of justice continuance where there is *evidence* that the continuance was *in fact* granted upon *the factors set out* in the nunc pro tunc order *at the actual time of the granting of the continuance.* In other words, the original order merely failed to state the reasons the continuance was granted and the nunc pro tunc order did not conflict therewith but merely stated the specific reasons. Here, there was not a mere filling in of an obvious omission, but the order here is in direct conflict with the prior order. What happened here falls within *U. S. v. Frey,* supra, wherein the court stated:

> "In light of our conclusion that the district court erred by making nunc pro tunc findings to accommodate its unwitting violations of the Act we need not decide whether the three types of delays identified in the district court's findings are excludable under Section 3161(h) (8) (A)."

The opinion below further holds that a conquested calendar or the pressure of the Judge's other business excuses non-compliance with the Speedy Trial Act.

18 U. S. C. § 3161(*e*), to which the trial court, long after expiration of the speedy Trial Act deadline,, upon sug-

gestion by the Government, attempted to change over to as its basis for its violation, provides that after the mandate ordering a new trial, the trial *shall* commence *within 70 days, except that* the period for retrial may be extended to 180 days from said date *if unavailability of witnesses or other factors resulting from passage of time* shall make trial within seventy (70) days impractical. The following authorities, expressly hold that when a statute provides a specific requirement and sets out an exception or exceptions thereto, said statute should be construed to *impliedly exclude any other exception. Rylewicz v. Beaton Services,* 888 F.2d 1175(7), *In re Gerwer,* 898 F.2d 730(9), *U. S. v. Goldbaum,* 879 F.2d 811 (10), *Marshal v. Gibson's Products, Inc. of Plano,* 584 F.2d 668(5), and *Midlan v. Telecasting Co. v. Mickesa Television Co.,* 617 F.2d 1141(5).

It is certain that the above sole exception to said seventy (70) day requirement did not exist here. *Neither a congested calendar nor* the fact *that the Western District of Texas was short four Judges of the 10 that were recently authorized by Congress* constituted "unavailability of witnesses or other factors resulting from passage of time".

II.

The decision below as to Issues 4, 5 & 6 conflicts with applicable decisions of this Court and with decisions of other United States Court of Appeals decisions on the same matters.

All of said conflicts are on questions of constitu-

tional dimension.

A. Jeopardy

The panel opinion holds that after jeopardy has attached, the Trial Judge, *without considering any other alternatives,* may declare a mistrial and *retry the Defendant* without consent of the Defendant or his counsel *solely* because a juror on the second morning of trial had gone to the doctor and *the Judge's secretary* reported to the Judge that the doctor said he *doesn't think* the juror *should* continue. Such is directly contrary to *U. S. v. Starling,* 571 F.2d 934(5), *Cherry v. Director of the State Board of Corrections,* 613 F.2d 1262(5), *U. S. v. Dunkerly,* 579 F.2d 141(2), *U. S. v. Grasso,* 552 F.2d 46(2). Each of said decisions holds that *if the record fails to show consideration of all other alternatives "manifest necessity"* has not been shown and any *retrial is barred by jeopardy.* The record herein *fails to show* consideration by the Court *of any other alternative.* Appellant's counsel refused to agree to trial with only eleven jurors but affirmatively stated to the court that he would like to go forward and if the Court would wait an hour the juror's problem might get straightened out. All of the above occurred in chambers outside the presence of the Defendant. Factual issues cannot be heard and decided outside the presence of a Defendant in a criminal case. *U. S. v. Hayman,* 72 S.Ct. 263; consent of a Defendant can not be inferred simply from a failure to specifically object. *U.S. v. Grasso,* supra; and a Defendant's *personal* consent is necessary to a mistrial declared sua sponte by the Trial Judge, *Torres v. State,* 614 S.W.2d 436. Though *U. S. v. Nichols,* 977 F.2d 972(5), in a holding admittedly contrary

to other Courts of Appeals decisions, holds that consent to a mistrial may be implied by the totality of circumstances, it certainly can not be implied where a Defendant, as here, is affirmatively asking the Court to hold up at least an hour to see if the juror will be alright. Furthermore, in *Nicholas,* supra, in response to the Defendant's Motion in Limine, the Court had ordered the prosecutor to refrain from injecting in the presence of the jury a prejudicial fact. It should be presumed that motions in limine should be and are directed only to those evidentiary matters which cannot be cured by an instruction. Upon the government's violation of said instruction, the Court, honoring the Defendant's presumptively sincere contention that such could not be cured, granted a mistrial after the Government had entered into two different discussions seeking to prevent the mistrial. Defendant's counsel apparently stood on said allegation in his motion in limine and made no response to the government's adversarial contention that a mistrial should not be granted. In this case the Court peremptorily announced that he was going to declare a mistrial for an *unforeseen event* and proceeded to do so. Defense counsel expressed to him that he wanted to go forward and that the Court should at least wait for some period of time in order to see if the juror might become alright. No one could conscientiously contend that Appellant or his counsel agreed to said mistrial.

B. Can Rules of Civil procedure excise an element from a statutory crime?

The opinion below holds that consideration of Appellant's point on insufficiency of the evidence to prove the

essential element of "materiality" in this perjury prosecution is foreclosed by a prior panel opinion of said court in *U. S. v. Holley*, 942 F.2d 916, *which holds that the elements of the statutory criminal offense of perjury have been altered and modified by the rules of Civil Procedure.* Such is directly contrary to settled principles of law declared by this Court. *Bell vs. U. S.*, 75 S.Ct. 620, *Arkansas Valley Ind. Inc. vs. Freeman*, 415 F.2d 713(8). Though the perjury statute, 18 U. S. C. 1621, expressly requires, and all prior decisions have held, that the alleged perjury must have been *material* to the *actual issues before the Court*, said panel opinion states as its basis for finding "materiality", "Courts have long recognized the broad scope of discovery," and goes on to state that even though evidence is irrelevant as to the issues in a trial the Federal Rules permit discovery of such,

> "if it appears reasonably calculated to lead to the discovery of admissible evidence .... *there would appear to be no sufficient reason why a deponent should not be held to his oath with respect to matters properly the subject of and material to the deposition* .... account must be taken of the more liberal rules of discovery." (Emph. ours)

Thus, said opinion below directly holds that an express statutory element of a crime should be ignored if the Court deciding the case concludes that there is no sufficient reason why Congress should have required such element.

In this case a deposition was taken of Appellant by Peoples Savings and Loan Association in an action in bankruptcy court brought by Peoples to determine Ap-

pellant's dischargeability as to certain *specifically alleged claims* against him by Peoples in its First Amended Complaint to determine dischargeability. (R. VII, P. 67-69, R. VIII, P. 103) Said amended complaint further alleged that said *specific acts* were dishonest and fraudulent and resulted in damages to Peoples and prayed for the damages described in their First Amended Complaint and an adjudication of non-dischargeability. (Govt. Exh. 15)

The alleged perjury attributed to appellant is that he falsely stated certain facts as to his knowledge pertaining to a $25,000 letter of credit that was signed by someone other than Appellant and delivered to a title company as escrow for a contemplated purchase of realty. *No claim was ever asserted in the bankruptcy proceedings pertaining to said $25,000 letter of credit* by the seller of said property nor by Peoples nor by any other person or entity. *It was undisputed that Peoples sustained no loss as a result of said $25,000 letter of credit.* Thus, it simply *was not* and *could not* be an issue in said bankruptcy proceedings as to dischargeability of certain alleged debts to Peoples.

In a perjury prosecution the test of materiality of statements *before a grand jury* is different from that used for statements made *before other bodies,* because the issues before a grand jury are less clearly defined than those before other bodies. *U.S. vs Mancuso,* 485 F.2d 275(2); *U. S. vs. Berardi,* 629 F.2d 723(2).

As stated in *U.S. vs. Alu,* 246 F.2d 29(2), "the test of materiality of statements made in a grand jury investiga-

tion is not that which is applied to evidence offered in civil or criminal litigation." In *Morris vs. U.S.*, 261 F.2d 175(7), where the false testimony was given in a bankruptcy proceeding, the Court held:

> "We see no escape from the conclusion that the false statements constituting the basis of the government's claim of perjury were *immaterial to the triable issues raised by the petition* in support of which the testimony was given." (Emph. ours)

The general rule applicable to this alleged perjury in a deposition out of the bankruptcy court is enunciated in Corpus Juris Secundum as follows:

> "With regard to forming the basis of a charge of perjury *a material matter is one that is legally capable of being proved in the cause.* In order for testimony to be material, it must have some weight and reference to the determination of an issue which is before the court or other body for an adjudication or investigation. Thus, the range of issues before a court is determined basically by the pleadings." (Emph. ours)
> *70 C.J.S. Perjury,* Sec. 13.

> "As a general rule the issues in a cause may be determined by an inspection of the pleadings and such issues are confined to those raised by the pleadings."
> *71 C.J.S. Pleading,* Sec. 515.

C. Failure, over objection, to charge the law declared by this Court.

The United States Supreme Court in *Bronston vs.*

U. S., 93 S. Ct. 595, expressly holds that a response to a question, though deliberately misleading, cannot constitute perjury unless it is literally false. Appellant objected to the failure of the court's charge to instruct the jury that even though it might find that the Defendant, in the testimony alleged in the indictment, inferred the existence or non-existence of a certain fact, it must find beyond a reasonable doubt that *the literal* meaning of the statement was false and that the defendant knew it was false at the time he made same. (R. X. P. 421, 422) Several of the alleged statements are undoubtedly literally true but might be deemed misleading. The failure of the court to respond to this specific objection is prejudicial error. This point was ignored by the opinion below. It is a critical right in any perjury case.

D. Denial of fundamental fairness, due process of law.

The element of materiality is always a *pure question of law for the Court* and *not the jury. U. S. vs. Abroms,* 947 F.2d 1241(5). The Trial Court, over proper objections, admitted in evidence *before the jury,* People's amended complaint in bankruptcy proceedings charging Defendant with fraud and dishonesty on numerous *other* totally disconnected matters, admitted testimony that the FSLIC felt that such accusations were valid, testimony that People's Savings and Loan sued Appellant for damages for fraud and negligence, testimony that in his deposition he never admitted being negligent or fraudulent (meaning that he had committed another act of perjury or lawyers for People's filed a false claim against him), testimony that Appellant, *a married man,* had an intimate personal relationship with Sally King, his former secretary, overruled objec-

tions to and motions to instruct out questions of Appellant as to whether or not Jim McLain agreed to pay him a kick *back of $662,000.00* on an entirely separate transaction, a statement by the prosecutor that he was employed by the Dallas *Bank Fraud Task Force* and whether Appellant was trying to make a profit for himself in deals with Ilene Marcus. The prejudicial error in said successful effort to try Appellant, not for the one isolated question of perjury on a particular transaction that occurred years before, but for fraud in general and adultery, were carefully preserved in the Trial Court and in the Court of Appeals. Each and every one of the above prejudicial injections was a direct violation of the en banc decision of the Fifth Circuit in *U. S. vs. Beechum*, 582 F.2d 848, in that the *Beechum* requirements that there be sufficient evidence of the extraneous offenses to withstand a motion for judgment of acquittal and that the prejudice therefrom nor far outweigh any probative value were patently not met. The panel opinion below herein ignores each and every one of these clear and certain *Beechum*, supra, violations to the extent that the fundamental fairness requisite to due process of law under the Fifth Amendment to the Constitution of the United States, was flagrantly violated.

CONCLUSION

For said reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals, Fifth Circuit, and Petitioner accordingly so prays.

Respectfully submitted:

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ATTORNEY FOR PETITIONER

CERTIFICATE

I hereby certify that three copies of the foregoing Petition for Writ of Certiorari have been duly mailed to counsel for the United States of America, Sean Connelly, U.S. Department of Justice, Room 2720, Washington, D.C 20530, this ____ day of May, 1993.

W. V. DUNNAM, JR.

APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

Jerry Don HOLLEY,
Defendant-Appellant.

No. 92-8156.

United States Court Of Appeals,
Fifth Circuit.

March 9, 1993

Defendant was convicted of perjury by the United States District Court, Western District of Texas, Lucius Desha Bunton, III, Chief Judge. Defendant appealed. The Court of Appeals, 942 F.2d 916, Garwood, Circuit Judge, reversed and remanded. Defendant was again convicted following retrial in the District Court, Jerry Buchmeyer, J. On appeal the Court of Appeals, Duhé, Circuit Judge, held that: (1) 180-day delay in retrial did not violate Speedy Trial Act, and (2) juror's illness was manifest necessity justifying sua sponte declaration of mistrial.

Affirmed.

Appeal from the Unite States District Court for the Western District of Texas.

Before WISDOM, and DUHE', Circuit Judges and HAIK, District Judge.[1]

DUHE', Circuit Judge:

Defendant, Jerry Don Holley, was convicted of two counts of perjury. He contends on appeal that his rights under the Speedy Trial Act, 18 U.S.C. § 3161, were violated, that his double jeopardy rights were violated, and that numerous evidentiary errors were made by the district court. Finding no reversible error, we affirm.

Background

Appellant, Jerry Don Holley, was a director and chairman of the board of Peoples Savings and Loan Association of Llano, Texas ("Peoples Savings"). Holley also owned a controlling stock interest and served on the senior loan committee of Peoples Savings. He actively solicited business on behalf of Peoples savings.

In 1985, Holley entered into an arrangement with Eileen Marcus to acquire real estate. Under the arrangement, Marcus was to find property to purchase and resell at a profit. Peoples Savings was to provide the financing. Marcus would not provide any financing or furnish a financial statement.

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[1] District Judge of the Western District of Louisiana, sitting by designation.

That summer, Marcus contracted to buy a shopping center, Southwest Parkway Plaza, for $2,400,000. The contract required that the buyer deposit with Safeco Title Company an irrevocable letter of credit for $25,000 as earnest money. Paulette Hubbard, an escrow agent for Safeco, received the contract and the letter of credit issued by Peoples savings. Some time later Hubbard noticed that the letter of credit lacked a signature.

Hubbard spoke to Holley about this on October 11, 1985. They agreed to meet on the following Monday in order for Holley to sign the letter of credit. On Monday Holley apparently told his secretary that a woman would visit the office with a letter to be signed and that the secretary should sign it using her mother's maiden name. He then left the office. When Hubbard arrived, Holley's secretary signed the letter using a fictitious name.

When Marcus did not close on the purchase of Southwest Parkway Plaza, the seller failed to collect on the letter of credit. People Savings refused to honor the letter of credit because it was not entered in Peoples Savings' register of letters of credit and the identity of the signator was unknown.

In January 1988, Holley filed for bankruptcy. Peoples Savings filed an adversary complaint in Holley's bankruptcy case to establish and determine dischareability of Holley's alleged debts to Peoples Savings. The adversary complaint alleged that as a shareholder, director, and chairman of the board of Peoples Savings, Holley engaged in fraud or defalcation while acting in a fiduciary capacity.

Holley was deposed in connection with this adversary proceeding. Based on statements he made in the course of that deposition about the letter of credit. Holley was indicted on two counts of perjury.

In 1990, after a jury trial, Holley was convicted on both counts. On appeal, this Court held that the failure to give a unanimity instruction was reversible error and vacated and remanded the case to district court. On retrial, Holley was again convicted on both counts. Holley appeals this conviction.

Discussion

I. Speedy Trial Act.

Holley complains that the trial court should have granted his motion to dismiss the indictment for violation of the Speedy Trial Act. On October 24, 1991, after remand, Chief Judge Bunton ordered the case transferred to Judge Belew for retrial on January 21, 1992. At that time, the district court declared that the time between the issuance of our mandate and the rescheduled trial was excluded from the time within which the defendant must be brought to trial under the Speedy Trial Act, 18 U.S.C. § U.S.C. § 3161(h)(8). Holley made no objection.

[1] Section 3161(h)(8) of the Speedy Trial Act referred to by the district court applies to continuances and not to retrials following appeal. The Government moved for clarification of the court's scheduling order under Federal

Rule of Criminal Procedure 36.[2] Specifically, the government moved the court to set forth the basis, on the record, for its findings that the ends of justice served by the setting of a trial date more than seventy days from the date of the court of appeals mandate outweighed the best interest of the public and the defendant in a speedy trial as required by § 3161(h)(8). Alternatively, the government asked the court to clarify and correct its order to reflect reliance on 18 U.S.C. § 3161(e), relating to cases retried following an appeal. The judge accordingly amended his original scheduling order citing 18 U.S.C. § 3161(e). We review the facts supporting a Speedy Trial Act ruling using the clearly erroneous standard, and the legal conclusions, de novo. *United States v. Ortega-Mena*, 949 F.2d 156, 158 (5th Cir.1991).

[2] Holley argues that the amended order, specifying reasons for the delay, states facts amounting to nothing more than crowded dockets. He argues that the law is settled and that neither a congested calendar nor the pressure of judges' other business can excuse non-compliance with the Speedy Trial Act.[3] We disagree.

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[2] Rule 36 states "Clerical mistakes in judgments, orders or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court orders."

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> ... If the defendant is to be tried again following an appeal or a collateral attack, the trial shall commence within seventy days from the date the action occasioning the retrial becomes final, except that the court retrying the case may extend the period for retrial not to exceed one hundred and eighty days from the date the action occasioning the retrial becomes final if unavailability of witnesses or other factors resulting from passage of time shall make trial within seventy days impractical. The periods of delay enumerated in section 3161(h) are excluded in computing the time limitations specified in this section.

Section 3161(e) gives the trial court greated flexibility in setting cases for trial following appeal than is provided in the initial indictment-to-trial cases. The cases relied upon by Holley discuss violations of the Speedy Trial Act under § 3161(h)(8). We believe that those cases do not apply to this situation. As stated in the district court's amended order, between the date the case was originally tried and the date the case was subsequently remanded, the trial judge became involved in a lengthy seven week trial. Additionally, the resident judge in Waco, where the case was to be tried, recused himself. Finally, at the time Holley was to be retried, the Western District of Texas was four judges short of the ten judges authorized by Congress. As a consequence of these conditions resulting from the passage of time, there was no practical way to try the case within seventy days and the court extended the trial date. Holley was tried within 180 days from the date this Court issued its mandate. We believe that Holley was not prejudiced by

the delay, and therefore his rights under the Speedy Trial Act were not violated.

II. Double Jeopardy Claim.

Holley next contends that his double jeopardy rights under the Fifth Amendment were violated by the declaration of a mistrial. One day after the jury was sworn, a juror became ill and the judge declared a mistrial. Holley refused to continue trial with only eleven jurors, and did not object to the mistrial order on double jeopardy grounds. The trial judge, after a discussion with the juror's doctor, determined that the woman would not be able to continue. Defense counsel asked the court to wait an hour before discharging the jury to determine whether the juror's health would improve. The court responded that the juror's illness would not get better, and instructed defense counsel to confer with his client regarding whether he wished to continue the trial. The record does not reflect Holley's response, however, a new jury was empaneled that afternoon and there were no objections by counsel.

[4,5] The double jeopardy clause protects a defendant's right to have his trial completed by a particular tribunal. *Crist v. Bretz,* 437 U.S. 28, 36, 98 S.Ct. 2156, 2161, 57 L.Ed.2d 24 (1978). Nonetheless, the double jeopardy clause is not an absolute bar to reprosecution once the jury has been empaneled and sworn. Without the defendant's consent, however, reprosecution is more difficult.

[6,7] A retrial following a *sua sponte* declaration of mistrial over defendant's objection is not prohibited under

the fifth amendment where the court determines that the declaration of a mistrial is a "manifest necessity." *United States v. Dinita*, 124 U.S. 600. 606-07, 96 S.Ct. 1075, 1079, 47 L.Ed.2d 267 (1976). For example, manifest necessity for mistrial exists where judge or juror cannot attend because of illness or deeath. *Cherry v. Director, State Bd. of Corrections*, 635 F.2d 414, 419 (5th Cir. Jan. 1981), *cert. denied*, 454 U.S. 840, 102 S.Ct. 150, 70 L.Ed.2d 124 (1981).

[8] This Court will uphold the trial court's finding of "manifests necessity" if the court exercised "sound discretion" in making that determination. *United States v. Bauman*, 887 F.2d 546, 549 (5th Cir.1989), *cert. denied*, *Talamas v. United states*, 498 U.S. 1077, 110 S.Ct. 1128, 107 L.Ed.2d 1034 (1990). As the trial court is most familiar facts surrounding the mistrial, the judge's mistrial order is given the "highest degree of respect." *Id.*, at 549.

[9] Holley primarily argues that no manifest necessity existed for the declaration of the mistrial. He contends that the circumstances did not warrant a mistrial. Obviously, the court disagreed, and so do we. A mistrial was declared only when it became clear that the sick juror would not be able to continue. Holley declined to continue the trial with only eleven jurors and made no objection to the court's *sua sponte* declaration of a mistrial. The clear inference from defense counsel's actions was that he acquiesced to proceeding with the new trial. Even without Holley's acquiescence, the judge exercised sound discretion in determining that manifest necessity existed for the declaration of a mistrial.

III. Materiality.

Holley also claims that the evidence was insufficient to support the jury's verdict because the government failed to produce sufficient evidence of the materiality of the alleged perjury, an essential element of the offense charged. This issue was raised by Holley in his first appeal in this case. *See United States v. Holley,* 942 F.2d 916, 923 (5th Cir.1991). Holley argues that the court should overturn its previous decision regarding materiality because of additional evidence that was adduced in this second trial. After Holley's first trial, but prior to this Court's decision on appeal, the FDIC dismissed it's bankruptcy claims against Holley. He contends that the FDIC admitted that Peoples Savings did not have a valid claim in bankruptcy when it voluntarily dismissed the adversary proceeding. Because the perjurious statements related to the dismissed claim, Holley argues that the perjurious statements could not be material to Holley's bankruptcy proceeding, and thus the government failed to prove an essential element of perjury. At the time we rendered our decision on Holley's first appeal, however, the fact that Peoples Savings' claims had been dismissed was considered. *Holley* 942 F.2d at 923 n. 8. Therefore, reconsideration of this issue is foreclosed by this Court's decision in the previous appeal.

As to Holley's remaining points of error, we have carefully reviewed all pertinent parts of the record, and given due consideration to the briefs and arguments of counsel, but we have found, on the particular facts before us, no reversible error.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-8156

D.C. Docket No. 6: CR 90 00054 01

FILED
MAR 09 1993

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JERRY DON HOLLEY,
Defendant-Appellant.

Appeal from the United States District Court for the Western District of Texas

Before WISDOM and DUHE, Circuit Judges and HAIK[1], District Judge.

ISSUED AS MANDATE: APR 25 1993

A true copy
Test
Clerk, U.S. Court of Appeals, Fifth Circuit
By/s/ Illegible
Deputy
New Orleans, Louisiana APR 26 1993

[1] District Judge of the Western District of Louisiana, Sitting by designation.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

March 9, 1993

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 92-8156

FILED
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United States of America,
Plaintiff-Appellee,

VERSUS

Jerry Don Holley,
Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas

Before WISDOM and DUHE', Circuit Judges and HAIK, District Judge.[1]

DUHE', Circuit Judge:

Defendant, Jerry Don Holley, was convicted of two counts of perjury. He contends on appeal that his rights

[1] District Judge for the Western District of Louisiana, sitting by designation.

under the Speedy Trial Act, 18 U.S.C. § 3161, were violated, that his double jeopardy rights were violated, and that numerous evidentiary errors were made by the district court. Finding no reversible error, we affirm.

Background

Appellant, Jerry Don Holley, was a director and chairman of the board of Peoples Savings and Loan Association of Llano, Texas ("Peoples Savings"). Holley also owned a controlling stock interest and served on the senior loan committee of Peoples Savings. He actively solicited business on behalf of Peoples Savings.

In 1885, Holley entered into an arrangement with Eileen Marcus to acquire real estate. Under the arrangement, Marcus was to find property to purchase and resell at a profit. Peoples Savings was to provide the financing. Marcus would not provide any financing or furnish a financial statement.

That summer, Marcus contracted to buy a shopping center, Southwest Parkway Plaza, for $2,400,000. The contract required that the buyer deposit with Safeco Title Company an irrevocable letter of credit for $25,000 as earnest money. Paulette Hubbard, an escrow agent for Safeco, received the contract and the letter of credit issued by peoples Savings. Some time later Hubbard noticed that the letter of credit lacked a signatur.

Hubbard spoke to Holley about this on October 11, 1985. They agreed to meete on the following Monday in

in order for Holley to sign the letter of credit. On Monday Holley apparently told his secretary that a woman would visit the office with a letter to be signed and that the secretary should sign it using her mother's maiden name. He then left the office. When Hubbard arrived, Holley's secretary signed the letter using a fictitious name.

When Marcus did not close on the purchase of Southwest Parkway Plaza, the seller failed to collect on the letter of credit. People Savings refused to honor the letter of credit because it was not entered in Peoples Savings' register of letters of credit and the identity of the signator was unknown.

In January 1988, Holley filed for bankruptcy. Peoples Savings filed an adversary complaint in Holley's bankruptcy case to establish and determine dischareability of Holley's alleged debts to Peoples Savings. The adversary complaint alleged that as a shareholder, director, and chairman of the board of Peoples Savings, Holley engaged in fraud or defalcation while acting in a fiduciary capacity. Holley was deposed in connection with this adversary proceeding. Based on statements he made in the course of that deposition about the letter of credit. Holley was indicted on two counts of perjury.

In 1990, after a jury trial, Holley was convicted on both counts. On appeal, this Court held that the failure to give a unanimity instruction was reversible error and vacated and remanded the case to district court. On retrial, Holley was again convicted on both counts. Holley appeals this conviction.

Discussion

I. Speedy Trial Act.

Holley complains that the trial court should have granted his motion to dismiss the indictment for violation of the Speedy Trial Act. On October 24, 1991, after remand, Chief Judge Bunton ordered the case transferred to Judge Belew for retrial on January 21, 1992. At that time, the district court declared that the time between the issuance of our mandate and the rescheduled trial was excluded from the time within which the defendant must be brought to trial under the Speedy Trial Act, 18 U.S.C. § U.S.C. § 3161(h)(8). Holley made no objection.

Section 3161(h)(8) of the Speedy Trial Act referred to by the district court applies to continuances and not to retrials following appeal. The Government moved for clarification of the court's scheduling order under Federal Rule of Criminal Procedure 36.[2] Specifically, the government moved the court to set forth the basis, on the record, for its findings that the ends of justice served by the setting of a trial date more than seventy days from the date of the court of appeals mandate outweighed the best interest of the public and the defendant in a speedy trial as required by § 3161(h)(8). Alternatively, the government asked the court to clarify and correct its order to reflect reliance on 18 U.S.C. § 3161(e), relating to cases retried following an appeal. The judge accordingly amended his

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Holley argues that the amended order, specifying reasons for the delay, states facts amounting to nothing more than crowded dockets. He argues that the law is settled and that neither a congested calendar nor the pressure of judges' other business can excuse non-compliance with the Speedy Trial Act.[3] We disagree.

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